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No. 94-623

Supreme Court
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In The

Supreme Court of the United States

October Term, 1994

VIMAR SEGUROS Y REASEGUROS, S.A.,

Petitioner,

v.

M/V SKY REEFER, HER ENGINES, ETC., and M.H. MARITIMA, S.A.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF *AMICUS CURIAE* OF AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, INC., ASSURANCEFORENINGEN GARD (GJENSIDIG), ASSURANCEFORENINGEN SKULD (GJENSIDIG), THE BRITANNIA STEAM SHIP INSURANCE ASSOCIATION LIMITED, LIVERPOOL AND LONDON STEAMSHIP PROTECTION AND INDEMNITY ASSOCIATION LIMITED, THE LONDON STEAM SHIP OWNERS MUTUAL INSURANCE ASSOCIATION LIMITED, THE NEWCASTLE PROTECTION AND INDEMNITY ASSOCIATION, THE NORTH OF ENGLAND PROTECTING AND INDEMNITY ASSOCIATION LIMITED, THE SHIPOWNERS' MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG), THE STANDARD STEAMSHIP OWNERS PROTECTION AND INDEMNITY ASSOCIATION (BERMUDA) LIMITED, THE STEAMSHIP MUTUAL UNDERWRITING ASSOCIATION (BERMUDA) LIMITED, SVERIGES ANGFARTYGS ASSURANS FORENING, THE UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION (BERMUDA) LIMITED, AND THE WEST OF ENGLAND SHIPOWNERS MUTUAL INSURANCE ASSOCIATION (LUXEMBOURG) IN SUPPORT OF RESPONDENTS

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S. REP. NO. 742, 74th Cong., 1st Sess. (1935) 12

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Uniform Ocean Bills of Lading: Hearings on S. 1152 Before the House Committee on Merchant Marine and Fisheries, 74th Cong., 2d Sess. (1936) 20, 21

OTHER AUTHORITIES:

FRANCESCO BERLINGIERI, NOTES ON THE HAGUE RULES, 1921 (1922) 13

William R.A. Birch Reynardson, *The History and Development of P&I Insurance: The British Scene*, 43 TUL. L. REV. 457 (1969) 3

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David C. Frederick, *Political Participation and Legal Reform in the International Maritime Rulemaking Process: From the Hague Rules to the Hamburg Rules*, 22 J. MAR. L. & COM. 81 (1991) 23

GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY (2d ed. 1975) 3

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American Steamship Owners Mutual Protection and Indemnity Association, Inc., Assuranceforeningen Gard (Gjensidig), Assuranceforeningen Skuld (Gjensidig), The Britannia Steam Ship Insurance Association Limited, Liverpool and London Steamship Protection and Indemnity Association Limited, The London Steam Ship Owners Mutual Insurance Association Limited, The Newcastle Protection and Indemnity Association, The North of England Protecting and Indemnity Association Limited, The Shipowners' Mutual Protection and Indemnity Association (Luxembourg), The Standard Steamship Owners Protection and Indemnity Association (Bermuda) Limited, The Steamship Mutual Underwriting Association (Bermuda) Limited, Sveriges Angfartygs Assurans Forening, The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited, and The West of England Shipowners Mutual Insurance Association (Luxembourg) respectfully submit this brief as *amici curiae* in support of the respondents.

Petitioner and respondents have given their consent to the filing of this brief, and copies of their attorneys' letters granting consent are being filed with the Clerk of the Court in conjunction with this brief.

INTEREST OF AMICI CURIAE

Amici compromise fourteen mutual insurance associations known as "protection and indemnity clubs" (often abbreviated as "P&I clubs"). P&I clubs are "associations of shipowners banded together to spread and

absorb liabilities falling on their members." GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 76 (2d ed. 1975); *see also* LESLIE J. BUGLASS, MARINE INSURANCE AND GENERAL AVERAGE IN THE UNITED STATES 386-418 (3d ed. 1991); William R.A. Birch Reynardson, *The History and Development of P&I Insurance: The British Scene*, 43 TUL. L. REV. 457 (1969); John P. Kipp, *The History and Development of P&I Insurance: The American Scene*, 43 TUL. L. REV. 475 (1969). The members of *amici* are owners and operators of ships of practically all maritime nations. In the aggregate, *amici* insure tens of thousands of vessels totaling almost 400 million gross registered tons, or more than 85% of the world's ocean-going tonnage. *Amici* protect their members in respect of most of the liability risks that arise from the operation of vessels in international maritime commerce.

One significant liability risk for which *amici* insure their members is the risk that vessel owners will be held liable to cargo owners for the loss of or damage to cargo carried on their vessels. *See, e.g.*, BUGLASS, *supra*, at 410-411; John C. Moore, *Liability for Damage to Property Carried, to be Carried, or Which Has Been C rried*, 43 TUL. L. REV. 581, 582-583 (1969). Thus *amici* have a vital interest in the proper interpretation of the legal standards under which liability may be imposed, including the Carriage of Goods by Sea Act ("COSGA"), 46 U.S.C. app. §§ 1300-1315.

Amici have a particular interest in the resolution of the present case. Some members of the *amicus* associations use standard-form bills of lading that include clauses calling for arbitration in forums outside of the

United States. *Amici* accordingly have an interest in seeing that such clauses are enforceable in the U.S. courts. A far larger number of their members use standard-form bills of lading with clauses calling for *litigation* in forums outside of the United States. (These are commonly referred to as "forum selection clauses.") *Amici* accordingly have an even greater interest in urging that these forum selection clauses be enforceable in the United States.

Petitioner seeks a reversal of the decision below on the basis of a simple argument. Its major premise is that section 3(8) of COGSA,[1] 46 U.S.C. app. § 1303(8), invalidates forum selection clauses calling for foreign litigation. The minor premise is that foreign arbitration clauses should be treated in the same way, notwithstanding the strong federal policy favoring arbitration. If the Court accepts both of these premises, it would follow that foreign arbitration clauses are invalid under COGSA. If the Court rejects either of these premises, however, petitioner's argument fails and the decision below must be affirmed. *Amici* urge affirmance of the decision below and rejection of petitioner's major premise.

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[1] Section 3(8) of COGSA provides:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this Act, shall be null and void and of no effect. A benefit of insurance in favor of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.

The First Circuit assumed, *arguendo*, that petitioner's major premise was correct. *See* 29 F.3d at 730; Petition for Certiorari Appendix ("Petn. App.") at 7a-8a. This assumption, while consistent with a line of lower court authority in the United States starting with *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967) (en banc), was wrong. The First Circuit then proceeded to reject petitioner's minor premise.

Although *amici* support both the First Circuit's result and its reasoning with respect to petitioner's minor premise, *amici* believe that it would be more appropriate to decide the case by rejecting petitioner's major premise. Properly understood, COGSA section 3(8) does not govern forum selection clauses. So holding is the most straight-forward way to resolve the present controversy, avoiding any possibility of conflict between two federal statutes. It also enables the Court to narrow an international conflict on the proper interpretation of the "Hague Rules" – the international treaty on which COGSA is based. *Compare, e.g., The Benarty*, 1985 Q.B. 325 (Eng. C.A. 1984), *with Indussa, supra; see generally* Michael F. Sturley, *International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation*, 27 VA. J. INT'L L. 729, 774-796 (1987). Finally, the enforceability of forum selection clauses is relevant in a far greater number of COGSA cases than is the enforceability of arbitration clauses.

Amici accordingly file this brief urging the Court to affirm the decision below on the basis that section 3(8)

does not govern forum selection clauses, and thus does not invalidate an arbitration clause.

SUMMARY OF ARGUMENT

As a general rule, forum selection clauses are enforceable in admiralty. Section 3(8) of COGSA does not change this general rule. Forum selection clauses in bills of lading should therefore be enforceable under the same standards as other forum selection clauses.

In *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991), this Court held that the Limitation of Vessel Owner's Liability Act, 46 U.S.C. app. § 183c, does not prohibit forum selection clauses in cruise line passenger tickets. That reasoning applies at least as strongly in this context. The language of section 3(8) is less susceptible than section 183c to an interpretation that covers forum selection clauses, the legislative history of section 3(8) demonstrates a conscious decision *not* to cover forum selection clauses, and the policy behind section 3(8) reveals a weaker need to prohibit forum selection clauses.

The legislative history of section 3(8) and the *travaux préparatoires* of article 3(8) of the international convention on which COGSA is based (the "Hague Rules") both demonstrate that the draftsmen never intended the provision to apply to forum selection clauses. The principal model on which the international convention was based included a prohibition of forum selection clauses, but the international draftsmen decided that this was not an issue that the treaty should address. Article 3(8) was

intended to cover only issues relating to a carrier's substantive rights and responsibilities.

When Congress enacted COGSA, it had a wide range of options before it – including options that would have prohibited forum selection clauses. Congress nevertheless decided to enact the international convention, knowing that it was not intended to prohibit forum selection clauses.

Lower courts that have created a *per se* rule against forum selection clauses in bills of lading have erred. Acting without the benefit of the Hague Rules' *travaux préparatoires* or COGSA's legislative history, they were forced to guess at the intent of the draftsmen based on their views of what the draftsmen should have intended. They also acted without the benefit of this Court's teachings in *Carnival Cruise Lines*.

ARGUMENT

As a general rule, forum selection clauses are enforceable in admiralty. *See Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). The narrow question before this Court is whether section 3(8) of COGSA, 46 U.S.C. app. § 1303(8), changes this general rule with respect to forum selection clauses in bills of lading. Both this Court's precedents and the legislative history of COGSA demonstrate that section 3(8) does not have this effect. Forum selection clauses in bills of lading should therefore be enforceable under the same standards as other forum selection clauses.

I. This Court's Precedents Demonstrate that COGSA Section 3(8) Does Not Apply to Forum Selection Clauses

In *Carnival Cruise Lines, supra,* this Court held that the Limitation of Vessel Owner's Liability Act, 46 U.S.C. app. § 183c,[2] a statute closely analogous to COGSA section 3(8), does *not* prohibit forum selection clauses in cruise line passenger tickets. *See* 499 U.S. at 595-597. The Court,

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[2] The Limitation of Vessel Owner's Liability Act provides, in relevant part:

> It shall be unlawful for the . . . owner of any vessel transporting passengers between ports of the United States or between any such port and a foreign port to insert in any . . . contract . . . any provision or limitation (1) purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants, to relieve such owner . . . from liability, or from liability beyond any stipulated amount, for such loss or injury, or (2) purporting in such event to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability for such loss or injury, or the measure of damages therefor. All such provisions or limitations contained in any such . . . contract . . . are declared to be against public policy and shall be null and void and of no effect.

46 U.S.C. app. § 183c. Since this Court's decision in *Carnival Cruise Lines,* Congress has amended section 183c twice. The second amendment reversed the first, however, so the statute is currently the same as it was at the time of *Carnival Cruise Lines. See* Coast Guard Authorization Act of 1993, Pub. L. No. 103-206, § 309, 107 Stat. 2419, 2425 (1993); Oceans Act of 1992, Pub. L. No. 102-587, § 3006, 106 Stat. 5039, 5068 (1992).

applying *The Bremen, supra,*[3] reasoned that section 183c prohibits a carrier from lessening its liability directly, but does not apply to a clause selecting the court to determine a carrier's liability. This is true even if the provision causes a plaintiff unreasonable hardship and thus reduces the carrier's liability indirectly. *See* 499 U.S. at 596.

The *Carnival Cruise Lines* reasoning applies at least as strongly in this context. Petitioner here makes exactly the kind of indirect burden argument as did the *Carnival Cruise Lines* respondents. *See* Brief for the Respondents, *Carnival Cruise Lines* (No. 89-1647), at 34. But the language of section 3(8) is far less susceptible to an interpretation covering forum selection clauses. Section 183c contains two parts. *See supra* note 2. The first prohibits general exculpatory clauses in passenger tickets, while the second specifically prohibits clauses that lessen "the right of any claimant to a trial by court of competent jurisdiction." The second part of section 183c could plausibly have been read as prohibiting forum selection clauses, *see* 499 U.S. at 602-605 (STEVENS, J., dissenting), although a majority of this Court rejected that interpretation. But section 3(8) of COGSA is closely analogous to section 183c *without the second part. See supra* note 1. If section 183c with its more directly applicable language was insufficient to cover forum selection clauses, section 3(8) should not be construed to cover them with more general language that does not address the issue.

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[3] In *The Bremen,* this Court did not address the specific question now before it. *See* 407 U.S. at 10 n.11. But that decision nevertheless supports the result advocated here.

The *Carnival Cruise Lines* Court placed heavy emphasis on the fact that nothing in the legislative history of section 183c suggested a desire to prohibit forum selection clauses. *See* 499 U.S. at 596. Likewise, nothing in COGSA's legislative history suggests a desire to prohibit forum selection clauses. Moreover, the drafters of COGSA section 3(8) and the corresponding article 3(8) of the Hague Rules were well aware of the present issue, but they chose *not* to prohibit forum selection clauses. *See* Part II, *infra* pages 11-21.

Finally, the policy considerations that motivated the Court in *Carnival Cruise Lines* apply with at least as much force here. If any distinction should be made between cruise line passengers and multinational companies engaged in the business of shipping goods to or from the United States, it seems self-evident that the former have the greater need for the "consumer protection" that petitioner advocates. It would be anomalous to hold that an inequality of bargaining power (which was considered irrelevant in *Carnival Cruise Lines, see* 499 U.S. at 593) requires protection for insurance companies such as petitioner and its supporting *amici* when individual consumers have been denied the same protection. Any factual distinctions (such as the notice received by the Shutes compared to the notice received by petitioner,[4] *see* Petn. at 19 n.15) may be relevant to the "judicial scrutiny for fundamental fairness" that this Court has preserved,

[4] In view of the notice actually received by the Shutes ("as much as three pages of fine print" could communicate, 499 U.S. at 590), it is doubtful whether the difference here offers any meaningful factual distinction in petitioner's favor.

499 U.S. at 585, but they should play no role in deciding whether section 3(8) imposes a *per se* rule prohibiting all forum selection clauses.[5]

II. COGSA Section 3(8) and the Corresponding Article 3(8) of the Hague Rules Were Never Intended to Apply to Forum Selection Clauses

Just as the *Carnival Cruise Lines* Court considered it relevant to consult the legislative history of section 183c, *see* 499 U.S. at 596, it is important here to consider the history of COGSA. The task has two facets because COGSA is not simply a domestic statute; it is also the U.S. enactment of an international treaty popularly known as the Hague Rules.[6] *See, e.g., Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297, 301 (1959); Michael F. Sturley, *The History of COGSA and the Hague Rules*, 22 J. MAR. L. & COM. 1, 36-55 (1991).

Congress made some changes in the text of the Hague Rules. *See, e.g., id.* at 50. On most issues, however,

[5] Because this Court has preserved "judicial scrutiny for fundamental fairness," 499 U.S. at 585, affirming the First Circuit on the grounds suggested here would not be an invitation to the abuse of forum selection clauses. The general scrutiny applicable in every admiralty context provides all the protection that plaintiffs legitimately require.

[6] Brussels Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233, T.S. No. 931, 120 L.N.T.S. 155. This international convention is widely known as the "Hague Rules" because it is a modified version of the rules adopted by the International Law Association at the Hague Conference in 1921. *See generally* Sturley, *History, supra*, 22 J. MAR. L. & COM. at 22-32.

Congress' principal goal was to give effect to the international treaty. *See, e.g.*, 79 CONG. REC. 13341 (1935) (Sen. White), *reprinted in* 1 THE LEGISLATIVE HISTORY OF THE CARRIAGE OF GOODS BY SEA ACT AND THE TRAVAUX PRÉPARATOIRES OF THE HAGUE RULES 589 (M. Sturley ed. 1990) [*hereinafter* LEGISLATIVE HISTORY]; *id.* at 8954 (Sen. Thomas), *reprinted in* 1 LEGISLATIVE HISTORY at 587, S. REP. NO. 742, 74th Cong., 1st Sess. 4 (1935), *reprinted in* 1 LEGISLATIVE HISTORY at 534; H.R. REP. NO. 2218, 74th Cong., 2d Sess. 6 (1936), *reprinted in* 1 LEGISLATIVE HISTORY at 526. Section 3(8) is one of the many COGSA provisions that is substantially identical to the corresponding provision in the Hague Rules.[7] It is accordingly appropriate to consider both the international *travaux préparatoires* of the treaty and the domestic legislative history of the statute to determine the proper scope of section 3(8).

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[7] Article 3(8) of the Hague Rules provides:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault, or failure in the duties and obligations provided in this *article*, or lessening such liability otherwise than as provided in this *convention*, shall be null and void and of no effect. A benefit of insurance in favor of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.

51 Stat. at 250-251, 120 L.N.T.S. at 165. The only substantial differences between article 3(8) and COGSA section 3(8) are indicated by *italics*.

A. The International *Travaux Préparatoires*

The movement toward international uniformity on the rules governing bills of lading began over a century ago. *See generally* Sturley, *History, supra*, 22 J. MAR. L. & COM. at 6-9. Forum selection clauses were an important issue in the industry even then. U.S. cargo interests were particularly upset with forum selection clauses requiring claims to be litigated in England. *See, e.g., id.* at 10-11 & n.65 (citing H.R. REP. NO. 1988, 52d Cong., 1st Sess. 2 (1892); 24 CONG. REC. 172 (1892) (Rep. Coombs)). Despite this pressure, when Congress enacted the 1893 Harter Act, 46 U.S.C. app. §§ 190-196, it did not prohibit forum selection clauses.

In other countries, the cargo interests' opposition was more powerful. In 1904, Australia passed a statute along the lines of the Harter Act but explictily banning forum selection clauses. *See* Sea-Carriage of Goods Act 1904, No. 14, § 6 (Austl.). In 1911, New Zealand followed Australia's lead. *See* Shipping and Seaman Amendment Act, 1911, No. 37, § 9 (N.Z.). And in 1919, French Morocco did the same. *See* Code de Commerce Maritime, art. 264 (Morocco, French Zone, Mar. 31, 1919) (summarized in FRANCESCO BERLINGIERI, NOTES ON THE HAGUE RULES, 1921, at 25 n.1 (1922), *reprinted in* 2 LEGISLATIVE HISTORY, *supra*, at 524).

The most relevant example of foreign opposition to forum selection clauses is found in Canada. In 1910, Canada passed its statute modeled on the Harter Act, but section 5 explicitly provided:

> [A]ny stipulation or agreement purporting to oust or lessen the jurisdiction of any court having jurisdiction at the port of loading in Canada in respect of the bill of lading or document [of title], shall be illegal, null and void, and of no effect.

Water Carriage of Goods Act 1910, 9-10 Edw. 7, ch. 61, § 5 (Can.). The Canadian example is particularly relevant because the 1910 Canadian Act was the principal model for the Hague Rules. *See, e.g.*, 2 INTERNATIONAL LAW ASSOCIATION, REPORT OF THE 30TH CONFERENCE 160 (Hague Conference 1921) [*hereinafter* HAGUE CONFERENCE REPORT] (statement of Sir Norman Hill) ("We had to give effect to the Canadian Act"), *reprinted in* 1 LEGISLATIVE HISTORY, *supra*, at 266. Indeed, the principal impetus for the adoption of the Hague Rules was the British government's commitment to "uniform legislation throughout the Empire on the lines of the existing Acts dealing with shipowners' liability, but based more precisely on the Canadian Water Carriage of Goods Act, 1910." Imperial Shipping Committee, *Report on the Limitation of Shipowners' Liability by Clauses in Bills of Lading*, Cmd. 1205, at 9 (1921), *reprinted in* 2 LEGISLATIVE HISTORY, *supra*, at 138; *see* Sturley, *History*, *supra*, 22 J. MAR. L. & COM. at 18-21.

No provision in the Hague Rules prohibits forum selection clauses – despite the existence of an express provision to that effect in the principal model from which the Hague Rules draftsmen were working, despite similar provisions in three other statutes (and a proposed

statute[8]) considered by the draftsmen, and despite cargo interests' frequently expressed dissatisfaction with forum selection clauses. The conclusion appears self-evident: the Hague Rules were not intended to prohibit forum selection clauses.

Moreover, we know *why* the Hague Rules fail to follow the Canadian example on this point. The draftsmen made a deliberate decision not to prohibit forum selection clauses. At the London Conference of the Comité Maritime International (where the draft to be discussed by the international delegates received its final polishing before submission to the diplomatic conference, *see* Sturley, *History*, *supra*, 22 J. MAR. L. & COM. at 27-28), the delegates discussed some of the issues for which the rules made no provision. James Petrie, a British delegate, addressed forum selection clauses:

> I think this is a fitting moment just to mention something which was observed at [the International Law Association meeting in] Buenos-Aires. It is a matter of another lacuna, something missing, in the Hague Rules. . . . [T]he Argentine people, who are very interested in the Hague Rules and approve of them in substance, made one reservation, and that was that the Hague Rules did not contain any proviso as to jurisdiction. The Argentines passed a Resolution to the effect that they desired the International

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[8] When the Hague Rules were being drafted, proposed legislation in France would also have banned forum selection clauses in bills of lading. The delegates at the Hague discussed this aspect of the proposed legislation. *See* HAGUE CONFERENCE REPORT, *supra*, at 182-183, *reprinted in* 1 LEGISLATIVE HISTORY, *supra*, at 288-289.

> Law Association to recommend to the International Shipping Conference and to the Chamber of Shipping of the United Kingdom the following measure. That all disputes relative to the discharge of cargo should be settled at the port of destination, and by the Courts of the country of destination. You will easily see that this motion . . . met, on the part of the British delegates and other European delegates, with a great deal of opposition . . . . [Robert Temperley, another British delegate] suggested that we should just say that the Association were of opinion that that question of jurisdiction, which is not included in the present draft of the Hague Rules, should receive the consideration of competent bodies like the Comité Maritime International.

COMITÉ MARITIME INTERNATIONAL, LONDON CONFERENCE, OCTOBER 1922, at 405-407 (Bulletin no. 57), *reprinted in* 2 LEGISLATIVE HISTORY, *supra*, at 415-417. The CMI delegates, however, made no change in response to this observation. Directly after James Petrie spoke, Louis Franck (the president of the Comité Maritime International and the presiding officer of the subsequent diplomatic conference) attempted to summarize the sense of the delegates. He responded to the Argentine proposal directly:

> Then I hear that it has been suggested that we should increase the burden of the proposed Convention and of the Rules and include such matters as jurisdiction in it. . . . But surely this is not a system or a problem which only arises about the negligence clauses and we cannot bring it in here.

Id. at 411, *reprinted in* 2 LEGISLATIVE HISTORY, *supra*, at 421. In short, the forum selection problem was specifically raised, but there was general agreement that it was an issue beyond the scope of the Hague Rules. No further attempt was made to include a provision governing forum selection clauses.

Article 3(8) was instead designed to accomplish certain specific goals having nothing to do with forum selection clauses. Most importantly, it prohibited a carrier from disclaiming liability for its own negligence (except as permitted by the Rules). Thus the prohibition of "negligence clauses" features prominently in the *travaux préparatories*. *See, e.g.*, CONFÉRENCE INTERNATIONALE DE DROIT MARITIME, RÉUNION DE LA SOUS-COMMISSION, BRUXELLES 1923, at 35-36, *translated in* 1 LEGISLATIVE HISTORY, *supra*, at 425. A carrier could not reduce the obligations imposed on it by article 3, *see, e.g., id.* at 119, *translated in* 1 LEGISLATIVE HISTORY, *supra*, at 506, nor claim greater rights than those granted by article 4, *see, e.g., id.* at 38, *translated in* 1 LEGISLATIVE HISTORY, *supra*, at 428. In particular, a carrier could not reduce its liability per package below the article 4 (5) sum. *See, e.g.,* HAGUE CONFERENCE REPORT, *supra*, at 140, *reprinted in* 1 LEGISLATIVE HISTORY, *supra*, at 246. But all of these issues relate to the carrier's substantive rights and responsibilities. Matters viewed as "procedural," such as where suits under the Rules would be heard, were left to national law. In the United States, the governing national law is now set forth in *Carnival Cruise Lines* and *The Bremen*.

B. The Domestic Legislative History

Congress had ample opportunity to consider whether and how it would enact the Hague Rules. Between 1923 and 1936, no fewer than a dozen bills were introduced for this purpose, and the president also sought the advice and consent of the Senate on the international convention. During this period, six Congressional hearings were held on the subject, and three Congressional reports were issued. *See generally* Sturley, *History, supra*, 22 J. MAR. L. & COM. at 39-55. Furthermore, legislation based on the Hague Rules was not the only option before Congress. A series of bills introduced by Senator Knute Nelson and Congressmen (later Senator) K.D. McKellar covered the same ground in radically different fashion. *See id.* at 38. In particular, the Nelson-McKellar bills would have prohibited forum selection clauses purporting to oust or lessen the jurisdiction of the U.S. courts. *Id.* at 38 & n.303 (citing S. 427, 68th Cong., 1st Sess. § 3 (1923)).[9]

Congress, of course, was not required to choose between unwavering support for the international convention and a purely domestic solution such as the Nelson-McKellar bills. Congress could – and did – enact

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[9] The contemporary significance of the forum selection provision in these bills is illustrated by Congressman McKellar's characterization of it as one of "[t]he two main things" in the proposal. *Navigation of Vessels: Hearing on H.R. 8753 Before the House Committee on the Merchant Marine and Fisheries*, 63d Cong., 2d Sess. 7 (1914). It would be implausible to suggest that Congress failed to address forum selection clauses because they were not perceived as a problem at the time. In the bill of lading context, many people clearly did perceive them as a problem, and this was well known to Congress.

the provisions of the treaty with changes or additions considered suitable. In fact, sections 9 to 16 of COGSA, 46 U.S.C. app. § 1309-15, are purely domestic law, and have no counterpart in the Hague Rules. On the forum selection issue, Congress could have followed the example of Australia, which enacted the Hague Rules in 1924 with an additional provision explicitly prohibiting forum selection clauses. *See* Sea-Carriage of Goods Act 1924, No. 22, § 9(2) (Aust1.). Faced with this wide range of choices, however, Congress enacted the Hague Rules (which were not intended to prohibit forum selection clauses) without making any provision to modify the international understanding in this regard.

Congress' decision to enact the Hague Rules without relevant modification is particularly significant, for the international understanding had been called to Congress' attention. In *Maharani Woollen Mills Co. v. Anchor Line*, [1927] 29 Lloyd's Rep. 169 (Eng. C.A.), cargo claimants sued in England despite a forum selection clause in the bill of lading calling for suit in India. The trial court dismissed the case on the basis of the clause. On appeal, the plaintiffs argued that article 3(8) of the Hague Rules (then in force in Britain under the Carriage of Goods by Sea Act, 1924, 14 & 15 Geo. 5, ch. 22, sch., r. 3(8) (U.K.)), invalidated the forum selection clause because it reduced the carrier's liability. Lord Justice Scrutton, the great commercial judge of his generation and a noted authority on the carriage of goods by sea, quickly rejected this argument:

> [T]he liability of the carrier appears to me to remain exactly the same under the [forum selection] clause. The only difference is a question of

> procedure – where shall the law be enforced? – and I do not read any clause as to procedure as lessening liability.

29 Lloyd's Rep. at 169. The *Maharani Woollen Mills* decision not only established the law for England, it was summarized for Congress during the Senate hearing on the bill that became COGSA as an example of how foreign courts applied the Hague Rules. *See The Carriage of Goods by Sea: Hearing on S. 1152 Before the Senate Committee on Commerce*, 74th Cong., 1st Sess. 85 (1935) [*hereinafter 1935 Senate Hearing*], *reprinted in* 3 LEGISLATIVE HISTORY, *supra*, at 587; *see also id.* at 86 (citing *The Media*, [1931] 41 Lloyd's Rep. 80 (Eng. K.B.) (following *Maharani Woollen Mills Co. v. Anchor Line*)), *reprinted in* 3 LEGISLATIVE HISTORY, *supra*, at 588.[10] It is clear that the forum selection clause issue was squarely presented to Congress.

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[10] Relevant Belgian cases were also cited to Congress. Although the Belgian courts disapproved choice-of-law clauses in several of these cases, they upheld forum selection clauses under the Belgian enactment of the Hague Rules. *See 1935 Senate Hearing*, *supra*, at 88, *reprinted in* 3 LEGISLATIVE HISTORY, *supra*, at 590. In view of the heavy emphasis during the Congressional hearings on the British experience with its COGSA, the English cases are undoubtedly more relevant. *See, e.g., id.* at 29 (statement of A.B. Barber), *reprinted in* 3 LEGISLATIVE HISTORY, *supra*, at 531; *id.* at 66 (statement of James Sinclair), *reprinted in* 3 LEGISLATIVE HISTORY, *supra*, at 568; *Uniform Ocean Bills of Lading: Hearings on S. 1152 Before the House Committee on Merchant Marine and Fisheries*, 74th Cong., 2d Sess. 18-20 (1936) (Justice Department memorandum comparing the pending bill with the British Act), *reprinted in* 3 LEGISLATIVE HISTORY, *supra*, at 616-618.

The domestic legislative history contains no evidence of any desire to depart from the international understanding regarding forum selection clauses or the role of section 3(8). Indeed, the domestic legislative history closely mirrors the international *travaux préparatoires*. Section 3(8)'s primary purpose was seen as prohibiting carriers from exempting themselves from liability beyond what the Act permitted. *See, e.g.*, H.R. REP. NO. 2218, 74th Cong., 2d Sess. 6-7 (1936), *reprinted in* 1 LEGISLATIVE HISTORY, *supra*, at 526-527; *1935 Senate Hearing*, *supra*, at 46, *reprinted in* 3 LEGISLATIVE HISTORY, *supra*, at 548; *Uniform Ocean Bills of Lading: Hearings on S. 1152 Before the House Committee on Merchant Marine and Fisheries*, 74th Cong., 2d Sess. 95-96 (1936) [*hereinafter 1936 House Hearing*], *reprinted in* 3 LEGISLATIVE HISTORY, *supra*, at 693-694. A carrier's inability to reduce the package limitation was again cited as an example. *See, e.g., 1935 Senate Hearing*, *supra*, at 37, *reprinted in* 3 LEGISLATIVE HISTORY, *supra*, at 539; *1936 House Hearing*, *supra*, at 100, *reprinted in* 3 LEGISLATIVE HISTORY, *supra*, at 698. Every time that section 3(8) is raised, the concern is with the carrier's substantive rights and responsibilities. There is never any suggestion that forum selection clauses would be affected.

III. The Lower Courts That Have Created a *Per Se* Rule Against Forum Selection Clauses in Bills of Lading Are In Error

This Court has not decided whether forum selection clauses in bills of lading are enforceable. The Court could have decided the issue in *The Monrosa v. Carbon Black*

Export, Inc., 359 U.S. 180 (1959),[11] but it dismissed the writ of certiorari as improvidently granted. In *The Bremen*, *supra*, the Court specifically noted that COGSA did not govern the case. *See* 407 U.S. at 10 n.11. And *Knott v. Botany Mills*, 179 U.S. 69 (1900), which some have thought relevant,[12] involved neither COGSA nor a forum selection clause.

A number of lower courts have created a *per se* rule against forum selection clauses in bills of lading. *See, e.g., Indussa Corp. v. S.S. Ranborg*, *supra*. These decisions are simply wrong. The courts that announced them did not

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[11] The parties in *The Monrosa* had briefed the section 3(8) issue. *See* Brief for the Respondent, *The Monrosa* (No. 178), at 21-25; Reply Brief for the Petitioners at 10-14.

[12] Petitioner argues that *Knott* is on point. *See* Petitioner's Brief at 13-14. The relevant issue in *Knott* was "whether the first section of the Harter Act applies to a foreign vessel on a voyage from a foreign port to a port of the United States." 179 U.S. at 74. (Harter Act § 1 governs "any vessel transporting merchandise or property from or between ports of the United States and foreign ports." 46 U.S.C. app. § 190.) The Court held that the Harter Act did apply and ignored the bill of lading's inconsistent choice-of-law clause. Having determined that the Harter Act applied, the Court then used the Act's prohibition against exculpatory clauses to void a bill of lading clause that purported to exempt the carrier from liability for its own negligence. *See* 179 U.S. at 77. Contrary to petitioner's suggestion, the Court did not use this statutory prohibition to void the choice-of-law clause. Indeed, it would have been logically inconsistent to apply the Act's prohibition without deciding whether the Act itself applied. Once the decision to apply the Harter Act had been made, however, the choice-of-law clause was irrelevant. The relevant Harter Act provision was not the one prohibiting exculpatory clauses but the one expressing Congress' desire to have U.S. courts apply the Act to every vessel in the U.S. trade.

have the benefit of the Hague Rules' *travaux préparatoires* or of COGSA's legislative history, as these materials were not widely available before 1990. *See* 1 LEGISLATIVE HISTORY, *supra*, at vii. The courts were accordingly forced to guess at the intent of the draftsmen based on their views of what the draftsmen should have intended.

The courts that developed the *per se* rule also acted without the benefit of this Court's teachings in *Carnival Cruise Lines*. More recent decisions have already questioned whether the *Indussa* line of cases can survive these developments. Indeed, the court below expressed precisely these concerns. *See* 29 F.3d at 730; Petn. App. at 7a (noting "the arguably tremulous ground on which *Indussa* and its progeny currently sit"). *See also Fabrica de Tejidos la Bellota S.A. v. M/V Mar*, 799 F. Supp. 546, 561 (D. V.I. 1992); *Nissho Iwai American Corp. v. M/V Sea Bridge*, 1991 AMC 2070, 2079-80 (D. Md. 1991); *but see Underwriters at Lloyd's of London v. M/V "Steir,"* 773 F. Supp. 523, 524-527 (D. P.R. 1991) (distinguishing *Carnival Cruise Lines*).

Like the courts that established the *per se* rule, petitioner argues against the decision below based on its view of the appropriate balance between carrier interests and cargo interests. The appropriate balance, however, was struck at a series of international conferences at which the affected interests reached a compromise agreement. *See generally* David C. Frederick, *Political Participation and Legal Reform in the International Maritime Rulemaking Process: From the Hague Rules to the Hamburg Rules*, 22 J. MAR. L. & COM. 81, 86-93 (1991). Under this compromise, some risks are borne by carriers and their insurers; others by cargo owners and their insurers. The international diplomatic community then adopted this

compromise in the Hague Rules and Congress enacted it in COGSA. It is not the courts' function to revise these judgments based on their views of what an appropriate balance should have been.

CONCLUSION

The decision of the First Circuit should be affirmed on the ground that section 3(8) of COGSA does not prohibit forum selection clauses, and thus has no impact on arbitration clauses.

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